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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PEDRO LEONARDO MASCHERONI,

Petitioner

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

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36 pp

QUESTIONS PRESENTED

1. Has a former public employee whose employment and security clearance have been terminated as a result of false accusations been denied procedural due process in the form of a hearing and meaningful access to judicial review and remedies where his state court wrongful termination suit is stayed at the outset and on expiration of the stay dismissed on statute of limitation grounds despite (i) prior rulings in the case that the stay would not prejudice him and (ii) an incorrect representation by Respondents on which the stay was based, (iii) on which rulings and representation Petitioner detrimentally relied?

2. Could the state court first stay the case and later ignore or reverse its own and appellate earlier rulings in the case that Petitioner would not be prejudiced by the stay and nevertheless dismiss the case on statute of limitation grounds without having denied such procedural due process to Petitioner?

3. Does a state court's refusal either to follow the law of the case or estop Respondents from asserting the statute of limitations defense deny Petitioner such procedural due process?

4. May a state employee's employment be terminated for exercise of his First Amendment rights?

5. May a state employee's employment be terminated without judicial review?

6. May a state employee's employment be terminated on the basis of false testimony?

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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1998

PEDRO LEONARDO MASCHERONI, PETITIONER

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

Petitioner Pedro Leonardo Mascheroni Ph D respectfully petitions for a writ of certiorari to review the decision of the Court of Appeal of the State of California affirming a decision of the Superior Court sustaining without leave to amend a complaint and petition for writ of administrative mandate. The Regents of the University of California managed the Los Alamos National Laboratory (LANL) under a contract with the United States Department of Energy. The Regents hired Dr Mascheroni in 1979 and discharged him in 1987. Dr Mascheroni contended that his discharge was in retaliation for exercise of his rights of freedom of speech and in retaliation for whistle blowing. A hearing officer (Appendix V) and the Director of Los Alamos National Laboratory (Appendix U) upheld the termination. William A Risley, Security Officer, Department of Energy, Los Alamos Area Office in a Special Report to the Inspector General subsequently found that "Thus the LANL used false reasons to RIF Mascheroni." Appendix T-87.

OPINIONS BELOW

Dr Mascheroni challenged his discharge by action filed in California Superior Court on January 24 1991. The Regents moved to stay the California action on the Regents' representation that New Mexico was a more convenient forum. The California Superior Court granted the motion on May 29 1991. Appendix E. The California Court of Appeal affirmed. Appendix D. Motions, appeals and writs to lift the stay were denied in 1991, 1994 and 1995 by the California Superior Court, Court of Appeal and Supreme Court. Appendices G, I and J.

Dr Mascheroni filed actions in New Mexico federal and state courts. The Regents moved to dismiss the New Mexico actions under statutes of limitations. These motions were granted. Appendices H, K, L, M and N.

After the New Mexico actions by Dr Mascheroni were dismissed, the California Superior Court on December 23 1996 lifted its stay . (Appendix C). Dr Mascheroni filed a first amended complaint and petition for writ of administrative mandate. The Regents moved and the trial court dismissed on the grounds that the petition for writ of administrative mandate was filed too late, that California limitations had not been stayed by the California 1991 stay order or the actions filed in New Mexico, and that Dr Mascheroni's actions for damages had been filed prematurely because he had not first obtained judgment on a petition for writ of administrative mandate. Appendix B.

The California Court of Appeal sustained the dismissal. Appendix A. The California Supreme Court denied review. Appendix F.

BASIS FOR JURISDICTION

This Court's jurisdiction over this case is based on Section 1257(a) of Title 28 of the United States Code. The judgment of the Court of Appeal of the State of California, First Appellate District, Division Four was entered on March 31 1998; that Court's order denying rehearing was entered on April 27 1998 and the order denying the Petition for Review to the Supreme Court of California was entered on June 17 1998. The Petition was therefore timely presented pursuant to Supreme Court Rules 13.1 and 30.1. The Clerk returned the petition by letter of September 23 1998 for revision to comply with Rules 14.1(a) and 14.1(i). This revised Petition is timely under Rule 14.5.

CONSTITUTIONAL PROVISIONS

Amendment 1: Congress shall make no law ... abridging the freedom of speech ....

Amendment 5: No person shall ... nor be deprived of life, liberty or property without due process of law.

Amendment 14: * * * No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States nor shall any State deprive any person of life, liberty or property, without due process of law ....

STATEMENT OF THE CASE

Facts.

Because this is an appeal from a dismissal on demurrer, all well-pleaded facts must be deemed true. *Zinermon v. Burch*,

494 U.S. 113, 125 (1990); *Blank v. Kirwan*, 39 Cal.3d 311, 318 (1985).

Petitioner, who holds a doctorate in physics from the University of California at Berkeley, was employed by the University in 1979 to do theoretical physics at the Los Alamos National Laboratory ("LANL") in New Mexico which it managed for the U.S. Department of Energy ("DOE"). He worked on a research program, for which funds were specifically appropriated by Congress and for which he had received appropriate security clearance, for the development of a carbon dioxide laser ("CO_2") intended to generate, confine and thereby make practical use of energy produced in atomic fusion reactions. CO_2 funding was diverted by other LANL physicists including Dr Mascheroni's superiors to development of a krypton fluoride target shooter laser ("KrF") proposed by William Mead, assistant leader of Petitioner's working group. Petitioner was critical of KrF and advocated development of a pulsed hydrogen fluoride laser ("HF") instead.

Dr Mascheroni's Group Leader Douglas Wilson and Division Leader Michael Henderson told Petitioner to keep quiet about the HF laser and to work on projects other than Dr Mascheroni's proposed HF laser. Dr Mascheroni in fact worked on the assigned other projects.

Pursuant to authority from and direction of Deputy Laboratory Director John Birely, Petitioner nevertheless continued to present his opinions in various forums which included presentations at LANL, at scientific meetings of the American Physical Society, at Sandia Laboratory and elsewhere that (i) KrF would not work (it has since been abandoned at LANL upon recommendation by the National Academy of Sciences (NAS)), (ii) even if the KrF did work it would cost

twenty times too much to be affordable and (iii) an HF laser could produce fusion energy at least 20 times cheaper than KrF so that electric power could be attained at an affordable price.

In December 1986 LANL Associate Director John Browne appointed a peer review panel of about ten scientists, chaired by Dr Greg Canavan, a former Director of the DOE Office of Inertial Confinement Fusion, to review Petitioner's HF proposal. Dr Canavan was also one of the key scientists who had initiated the KrF studies and diverted the CO_2 funding. The panel consisted mainly of managers and scientists supportive of the KrF effort, including Mead. The extensive competitive review of the HF technology, which included consideration of several other technologies, was done with full security clearance of all participants, including Petitioner. Petitioner's critique was determined to be scientifically valid, and on January 20 1987 the panel decided to recommend HF. The panel noted that the cost of the HF technology would be only about 5% of the cost of CO_2 or KrF.

In January 1987 X-Division Leader Henderson reported that LANL would engage in a reduction in force ("RIF"). Mascheroni's new Deputy Group Leader William Mead had brought the KrF proposal to LANL, and his Group Leader (Wilson) had ordered Mascheroni to keep quiet about his objections to KrF and the scientific superiority of an HF laser. Mead and Wilson made statements in the RIF narrative known by them to be false (that Mascheroni was incompetent as a scientist) for the purpose of terminating Mascheroni from LANL's Group X-1.

On February 4 1987 LANL gave Petitioner notice of termination from inertial confinement fusion research effective

April 10 1987.[1]

For good measure on April 21 1987 Wilson and LANL management falsely charged Dr Mascheroni with being a security risk. Wilson falsely implied that Petitioner was a spy for Argentina, his native country, and made other false charges of infraction of security rules. Wilson also conveyed the false information by written memorandum to Brent Boyack, Petitioner's supervisor in his demoted job.

As a result, DOE suspended Petitioner's security clearance two weeks after he briefed a National Academy of Sciences member and the director of the DOE Office of Inertial Fusion. This suspension further prevented Dr. Mascheroni from bringing the case for HF laser technology to the DOE's attention at the executive meeting in Los Alamos to discuss the HF recommendation.

The DOE suspended Dr Mascheroni's security clearance without conducting the hearing required by DOE guidelines.

William A Risley, Operational Security Officer, DOE/ Los Alamos Area Office thereafter conducted an investigation of the security related charges against Petitioner and filed a Special Report to the Inspector General of DOE, dated November 21 1991, which concluded:

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1. Dr Mascheroni's previous deputy division leader Dr Thomas Hirons found a job for Mascheroni as an entry level (college graduate) computer programmer in N Division but Dr Mascheroni was soon terminated from that make-work assignment.

> Thus LANL used false reasons to RIF Mascheroni. This was discovered in Laboratory grievance hearings, where the hearing officer recommended deletion of all the RIF-related memos about Mascheroni. Wilson and Henderson [Mascheroni's supervisors] brought trumped-up security issues against Mascheroni and put false information into the security system. After he was RIFed, they pursued security through OS and the LANL OS-Division Leader put security flags on Mascheroni's file that would bring about the suspension of his access. Because of the nature of this false, derogatory information from LANL management, DOE decided to suspend Mascheroni's access without following guidelines. Appendix T-87, quoted in First Amended Complaint ¶ 26.

Far from being contested, the foregoing facts are not only taken as true as a matter of law but are entirely uncontested: Hearing Officer Feller found that the Wilson and Mead statements about Dr Mascheroni were false (Appendix V-43 to V-49); and the allegations of paragraphs 26 and 27 of the First Amended Complaint are taken directly from Security Officer Risley's Special Report to the Inspector General of the Department of Energy dated November 21 1991. Appendix T-87 -T-89. The admitted facts that the charges against Dr Mascheroni were perjured hardly adds to the equity of the defendants' case.[2]

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2. *Mooney v. Holohan*, 294 U.S. 103 at 112 (1935) holds that due process prohibits "deliberate deception of court and

All of the attempts by Dr Mascheroni to obtain judicial review of his termination for exercise of his First Amendment right of freedom of speech have been denied.

Why Review Should Be Granted

The Supreme Court should decide whether it comports with due process of law for a state to deny all judicial review of a decision to terminate a public employee for exercise of his constitutional rights of freedom of speech by adopting rules of procedure which first stay the petitioner's action and then dismiss petitioner's action for failing to take action in the very same court while the stay remains in effect.

Claims below under the United States Constitution.

Dr Mascheroni first asserted his federal constitutional rights in Hearing Brief filed before the University grievance hearing officer and dated July 5 1988 stating:

> Termination of an employee for expressing his opinions violates both public policy of United States and California law.
> * * * * *
> In Bekiaris v. Board of Education, 6 Cal.3d 575 at 590 (1972) the Supreme Court held that

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jury" by a prosecution's knowing use of perjured testimony. No reason appears why the use of perjured testimony to sustain a termination of a public employee is any less a denial of due process of law in a civil case than it would be in a criminal case.

a:

> dismissed employee is entitled to **an independent judicial determination** of the ultimate question whether, in light of those facts, he was dismissed not for the reasons stated in the accusation but rather because of official dissatisfaction with exercise of his constitutional rights. (Page 36)(Emphasis added).

The Hearing Officer denied Dr Mascheroni's grievance on November 1990. On January 24 1991 Dr Mascheroni filed a wrongful termination complaint against the University in Alameda County Superior Court. LANL Director Hecker affirmed the decision of the Hearing Officer by letter dated February 8 1991. Shortly thereafter the University, having neither answered nor demurred, moved to stay Dr Mascheroni's complaint on the ground that New Mexico was a more convenient forum. In memorandum filed April 16 1991 in California Superior Court in opposition to motion to transfer the action to New Mexico Dr Mascheroni again asserted his rights under public policy designed

> to protect the employee's freedom to exercise **first amendment rights**." The policy was designed to "protect the employee's freedom to exercise first amendment rights ... See, Bekiaris v. Board of Education (1972) 6 Cal.3d 575, 590 ('dismissed employee is entitled to an independent judicial termination of the ultimate question whether ... he was

> dismissed ... because of official dissatisfaction with his exercise of constitutional right;) * * * (Page 11).

Dr Mascheroni's memorandum filed July 1 1991 in California Superior Court in support of motion to vacate the California stay cited *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 506-507 (1947):

> In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process * * * (Page 4)

Dr Mascheroni's same memorandum continues:

> It is a universally recognized rule that "He who seeks equity must do equity." Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 15 Cal.3d 564, 576 (Citations omitted). As the United States Supreme Court stated in Koster v. Lumbermens Mutual Casualty Co. (1946) 330 U.S. 518, 522:
>
> > [In forum non conveniens actions], as in all other petitions for equitable relief, he who seeks equity must do equity, and the court will be alert to see that the peculiar remedial process is in no way abused.(Pages 5-6).

The California court stayed Dr Mascheroni's

California action from May 29 1991 until December 18 1996, by which time it had become clear that no New Mexico forum was suitable. On December 18 1996 the California stay was lifted and on December 30 1996 Dr Mascheroni amended his complaint to add a petition for writ of administrative mandate. The University demurred on February 18 1997.

Dr Mascheroni in his Memorandum of Points and Authorities in Support of Motion to Augment Record, for Jury Trial and for Writ of Administrative Mandate filed April 1 1997 again quoted *Bekiaris v. Board of Education*, 8 Cal.3d 575 (1972) that he was entitled to an independent judicial determination whether he had been discharged in retaliation for exercise of his First Amendment constitutional rights:

> We think that in these circumstances such rule is indispensable to the integrity of the review process; otherwise the administrative board simply by its own findings can absolve itself of any action in derogation of constitutional rights and insulate such exculpation from any further scrutiny. 8 Cal.3d 575 at 592-593 (1972) (Page 11).

In his reply filed April 14 1997 to the Regents, Dr Mascheroni points out that denial of independent judicial review:

> is entirely inconsistent with *Bekiaris v Board of Education* (1972) 6 Cal3d 575 . . . and would also be unconstitutional under the

federal Constitution. *Yick Wo v Hopkins* (1886) 118 US 356 at 370 declared:

> When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest and review the history of their development, we are constrained to concluded that they do not mean to leave room for the play and action of purely personal and arbitrary power. * * * For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

Bakke v. Regents of the University of California (1976) 18 Cal3d 34 at 38 and in 438 US 265 at 293-294 cite and follow *Yick Wo v Hopkins*.

> Another problem of constitutional dimension is raised: Unless the court grants independent review final decision regarding Dr Mascheroni's employment has been left to persons who have a direct financial interest: * * *
>
> The actions by persons with a direct

> financial interest in the decision violated fundamental due process. *Tumey v Ohio* (1927) 273 US 510 at 523 held that it violates the Fourteenth Amendment to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case. (Memorandum pp 2-3).

The trial court sustained the University's demurrer on April 17 1997 without leave to amend. Dr Mascheroni appealed. In his brief filed with the California Court of Appeal on December 1 1997 Dr Mascheroni again cited *Bekiaris v. Board of Educ* (1972) 6 Cal.3d 575, 587 that

> the dismissed employee is entitled to an **independent judicial determination** of the ultimate question of whether, in light of [the] facts, he was dismissed not for the reasons stated in the accusation but rather because of official dissatisfaction with his exercise of constitutional rights.

Id at 590 (emphasis added). The California Court of Appeal denied Dr Mascheroni's appeal.

In his petition for review by the California Supreme Court filed May 8 1998 Dr Mascheroni again asserted:

> **4. The Supreme Court should grant the petition for hearing to avoid creating an**

unnecessary question whether California's procedure denies due process of law.

The United States and California constitutions provide that no person may be deprived of life, liberty or property without due process of law. US Constitution Amendment 5; California Constitution Article 1 §7. Due process of law includes independent judicial review of Administrative action. *Bekiaris v Board of Educ* (1972) 6 Cal 3d 575, 587 held that even where an administrative decision will be upheld if supported by substantial evidence

> the [petitioner for writ of administrative mandamus] is entitled to an *independent judicial determination* of the ultimate question whether, in light of [the] facts, he was dismissed not for the reasons stated in the accusation but rather because of official dissatisfaction with his exercise of *constitutional rights*. [Emphasis added.]

In *Crowell v Benson* (1932) 285 US 22 Chief Justice Hughes declared:

> In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to <u>independent determination</u>

> of all questions, both of fact and law, necessary to performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to "a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts." *Ohio Valley Water Co. v Ben Avon*, 253 U.S. 387, 64 L. ed. 908.... [Emphasis added. Further citations omitted].

285 US at 60.

> In the present instance, the argument that the Congress has constituted the deputy commissioner a fact-finding tribunal is unavailing, as the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved. * * * But when fundamental rights are in question, this Court has repeatedly emphasized the difference in security of judicial over administrative action. [Citation

omitted].

285 US at 60-61.

Dr. Mascheroni's petition also cited *St Joseph Stock Yards Co v. United States* (1936) 298 US 38 at page 52 stating:

> Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. [Emphasis added].

Dr. Mascheroni's petition for review in the California Supreme Court concluded:

> The decision of the Court of Appeal below denies due process to plaintiff Mascheroni because it denies him any judicial

review whatever, even though he filed his complaint in January 1991 and immediately filed his first amended complaint when the stay imposed by the trial court was lifted.

The trial court sustained the University's demurrer on the ground that Dr Mascheroni's petition for writ of administrative mandate was barred by the statute of limitation. Appendix B. The trial court's decision was error for four reasons: (1) a petition for writ of administrative mandate may be joined with causes of action for damages in the same action and commencement of the action relates back to the filing of the original complaint, (2) the trial court's stay prevented Dr Mascheroni from initiating a separate judicial proceeding on the same facts and calling it a petition for writ of administrative mandate instead of a complaint, (3) the trial court's stay of Dr Mascheroni's judicial action in California tolled limitations on Dr Mascheroni's petition for writ of administrative mandate, and (4) Dr Mascheroni's January 24 1991 filing of a complaint tolled limitations on his petition for writ of administrative mandate.

The California District Court of Appeal affirmed the trial court. Appendix A. The California Supreme Court denied review. Appendix F.

SUMMARY OF ARGUMENT

The foregoing facts show that the rulings of the California courts have totally denied Petitioner's due process right to reasonable access to its courts to remedy the loss of his property and First Amendment rights. California has caused

this deplorable result by staying Petitioner's wrongful termination suit, compelling him to seek to litigate it elsewhere and then, in disregard of its own authorities to the contrary, dismissed his case because he complied with its orders.

ARGUMENT

1. The Due Process clause protects petitioner's access to the California courts to attempt to protect his Fourteenth Amendment property rights and First Amendment rights of freedom of speech.

As Justice Jackson, writing for the Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 at 313 (1950), observed:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case...

Logan v. Zimmerman Brush Co., et al., 455 U.S. 422 at 429 (1982) declared:

> .....The Court traditionally has held the Due Process Clauses protect civil litigants who seek recourse in the courts, either as

> defendants hoping to protect their property or as Plaintiffs attempting to redress grievances. In *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), for example–where a plaintiff's claim had been dismissed for failure to comply with a trial court's order–the Court read the "property" component of the Fifth Amendment's Due Process Clause to impose 'constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.' Id., at 209. See also *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-351 (1909) (power to enter default judgment); *Hovey v. Elliott*, 167 U.S. 409 (1897) (same); *Windsor v. McVeigh*, 93 U.S. 274 (1876) (same). Cf. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed [rights]. *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).....

Justice Blackmun continued his opinion in *Logan* by stating:

> As our decisions have emphasized time

> and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that 'some form of hearing' is required before the owner is finally deprived of a protected property interest. *Board of Regents v. Roth*, 408 U.S., at 570-571... And that is why the Court has stressed that, when a 'statutory scheme makes liability an important factor in the State's determination..., the State may not, consistent with due process, eliminate consideration of that factor in its prior hearing.' *Bell v. Burson*, 402 U.S. , at 541. To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement. See id., at 542.

455 U.S. at 433-434.

Logan is ample authority for the proposition that termination of Petitioner's employment on the basis of false statements and in retaliation for his exercise of his First Amendment right to express his critical opinions of LANL's laser development programs was unconstitutional in the entire absence of <u>any</u> effective judicial process. But these themes have an elegant and aged lineage which can only be burnished by a brief chorus:

In *Crowell v. Benson*, 285 U.S. 22 (1932) Chief Justice Hughes declared:

> In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to **independent determination of all questions, both of fact and law, necessary to performance of that supreme function.** The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to "a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts." *Ohio Valley Water Co. v. Ben Avon*, 253 U.S. 387.
>
> In the present instance, the argument that the Congress has constituted the deputy commissioner a fact-finding tribunal is unavailing, as **the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved. * * * But when fundamental rights are in question, this Court has repeatedly emphasized the difference in security of judicial over administrative action.** (Citations omitted. Emphasis added.)

285 U.S. at 60-61.

Further to the point, *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936) declares at p. 52:

> Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. **It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.** (Emphasis added.)

And, in another civil case: *Zinermon v. Burch*, 494 U.S.113, 125 (1990):

> First, the Clause incorporates many of the specific protections defined in the Bill of Rights. A plaintiff may bring suit under §1983 for state officials' violation of his rights to, e.g., freedom of speech or freedom from unreasonable searches and seizures. Second, the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions "regardless of

> the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S., at 331. * * * The Due Process Clause also encompasses a third type of protection, a guarantee of fair procedure.

Finally, specifically as to free speech of public employees:

> "To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise which has been unequivocally rejected in numerous prior decisions of this Court. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

We now review the particular injustices imposed on Petitioner by the California courts in this case, all of which have been held to be such not only in this Court, but, equally pertinent, in California courts.

> **2. Due process and substantial justice have been denied because petitioner justifiably relied on the law of the case and other California law which held that he should not be prejudiced by the stay and by the**

failure of the California courts to apply accepted equitable principles.

The California courts effectively denied Petitioner any judicial review by allowing Respondents to obtain a stay of the California action and then reneging on their obligation to protect Petitioner from any resulting prejudice. Prejudice is clear: Petitioner in good faith did not file his claim for administrative mandamus during the period of the stay.

A. Respondents were estopped to take advantage of the stay.

In the first place Respondents should be bound by judicial estoppel from asserting that the California action is barred by the Statute of Limitations. Respondents judicially asserted that an adequate forum was available in New Mexico, asserting unequivocally in reply to Petitioner's opposition to the motion for stay that:

> A suitable alternative forum is unquestionably available in New Mexico.
> JA 174.

On the basis of that statement, the stay was granted and the case transferred to New Mexico on the ground of *forum non conveniens*. Once in New Mexico Respondents successfully asserted the Statute of Limitations . Then, having delayed matters for five years, the Regents were allowed to assert California's statute of limitations as soon as the stay was lifted. Having made a false statement and accepted the benefit thereof and having put Petitioner to great expense and

delay thereby, Respondents ought to have been estopped from taking further advantage of it. California follows this rule. *Herzog v. Frederics*, 61 Cal.App. 4th 672 (1998), 71 Cal.Rptr.2d 771.

Estoppel is not a new concept to this Court. In *Drexel v. Berney*, 122 U.S. 241, 253 (1887) the Court held:

> The ground of relief alleged in the present bill is, that by her acts and conduct the appellee has estopped herself, as against the complainants, from asserting any fact which annuls the executorship of James Berney under the Alabama probate, and the authority of St. James as his attorney in fact. **Estoppels of this character, as distinguished from estoppels by record or by deed, are called equitable estoppels. It is not meant thereby that they are cognizable only in courts of equity, for they are commonly enforced in actions at law**, as was fully shown in *Dickerson v. Colgrove*, 100 U.S. 578. But it does not follow, because equitable estoppels may originate legal, as distinguished from equitable rights, that it may not be necessary in particular cases to report to a court of equity in order to make them available. All that can properly be said is, that in order to justify a resort to a court of equity, it is necessary to show some ground of equity other than the estoppel itself, whereby the party entitled to the benefit of it is prevented from making it

> available in a court of law. **In other words, the case shown must be one where the forms of the law are used to defeat that which, in equity, constitutes the right. Such a case is one for equitable interposition.** [Emphasis added]

Nor has this Court abandoned the doctrine. *Oubre v. Entergy Operations*, 522 U.S. __ (1998), 139 L.Ed.2d 849 at 855 (1998) notes:

> As a rule, equitable estoppel bars a party from shirking the burdens of a voidable transaction for as long as she retains the benefits received under it.

The Respondents have accepted the benefits of their motion to stay, delaying Petitioner's case for more than five years by asserting that New Mexico provided a suitable forum for judicial review and using that wrongly obtained delay to have the case dismissed.

B. Petitioner has been fatally prejudiced by the stay.

The foregoing equities are reinforced by the unassailable legal facts: The law of this case and the law of other California cases quite clearly is that Petitioner ought not to have been prejudiced by the California order of stay and transfer to New Mexico as a supposedly more convenient forum.

1. The law of this case.

Petitioner appealed from the order granting Respondents's forum non conveniens motion and staying the action. The Court of Appeal denied that appeal and in the decision by Justice Reardon stated:

> It bears noting that the trial court stayed the California action pending the outcome of the New Mexico litigation; it did not dismiss the underlying action. **If New Mexico does not ultimately prove to be a suitable forum for Mascheroni, he will not have been prejudiced by the stay - he may petition the court to lift it at that time**. (Appendix D-7)(emphasis supplied.)

In the same opinion, Justice Reardon reserved for the trial court the decision whether "the Regents acted in bad faith in making inconsistent arguments" (Appendix D-7) , but that equitable stricture, too has been ignored, not only by the trial court, but also by the later Court of Appeal opinion, Appendix A.

Obviously, Petitioner has been sorely prejudiced: after much time and expense New Mexico did not prove to be a "suitable forum" for him and when he returned to renew his claim in California he was told that time had run despite the stay which prevented him from avoiding such a result by filing an appropriate pleading. This is an abysmal double bind, a Catch 22 in which the California court ought not to have participated.

2. The law of California.

Beard v. Superior Court, 39 C.A.2d 284 at 286 (1940) points out:

> It is the established law of California that the filing of a motion for the change of place of trial suspends the power of the trial court to act upon any other question until the motion has been determined [citations omitted] and that **any order made prior to the determination of the motion for a change of place of trial is a nullity .** [citation omitted].

Thus, by filing a motion for change of venue on March 29 1991, the Regents caused the Superior Court of the State of California to lose jurisdiction to enter any order authorizing Mascheroni to amend his complaint to include a petition for writ of administrative mandate.

When the trial court granted the motion for stay, that disability continued until the stay was lifted.

The Court of Appeal 1992 opinion quoted above simply recognized that in California, the concept that an alternative forum in which the issues can be fairly litigated is a prerequisite to staying or dismissing suit on grounds that the local forum is inconvenient. The Judicial Council Comments to California Code of Civil Procedure §410.30 state in part:

> Under the doctrine of inconvenient forum, a court, even though it has jurisdiction, will not

> entertain the suit if it believes that the forum of filing is a seriously inconvenient forum for the trial of the action. **But in such instances a more appropriate forum must be available to the plaintiff.** [Emphasis added.] West's Annotated Code Civil Procedure, §410.30 (1973 ed.), p. 490.

Delfosse v. CACI Ins. Federal, 218 Cal.App.3d at 689 (1990) cites the foregoing passage with approval. See also, Restatement (2d) Conflicts of Laws, §84, Comment C.

As the court in *Delfosse* stated:

> It strikes us as **anomalous, if not disingenuous**, to request dismissal of an action on the ground that it should be heard in another forum when **the action will likely never be heard** in the other forum because it is barred by the statute of limitations there. '*Delfosse*, *supra*, 218 Cal.App.3d at 690 (emphasis added) (quoting *Johnson v. Searle* (1989) 314 Md. 521, 552 A.2d 29.

Thus, Respondents knowingly sought and obtained a stay on the representation that New Mexico courts provided a suitable forum. By their own actions Respondents then made its own representation untrue by asserting statute of limitations and other successful defenses in the New Mexico actions.

It was Respondents' own actions which caused their

representation to become untrue and it was Respondents who obtained all the benefit of the untruth.

This Court stated in *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 522 (1946),

> [In forum non conveniens actions], as in all other petitions for equitable relief, he who seeks equity must do equity, and **the court will be alert to see that its peculiar remedial process is in no way abused**. [Emphasis added.]

Conclusion

For the reasons stated the Supreme Court should grant certiorari and should order the California courts to grant judicial review of the termination of Dr Mascheroni.

Dated November 16 1998

Respectfully submitted

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